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Government of Malaysia v Mahawira Sdn Bhd & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-152–03 OF 2019
LAU BEE LAN, ABU BAKAR AND LEE HENG CHEONG JJCA
12 MARCH 2021

C *Revenue law — Income Tax — Time tax becomes payable — Whether tax payable upon service of notices — Lliability of a director of a company — Whether a director may be liable for taxes assessed before the date the director took office — Service of notice — Whether knowing about notices served amounts to service — Application of s 75A(2)(b) of the Income Tax Act — Whether applied retrospectively*

D

Revenue Law — Income tax — Limitation — Claims made under s 106(1) of the Income Tax Act — Whether subjected to limitation under s 6(1)(d) of the Limitation Act 1963

E

This was a partial appeal against the decision of the high court on a tax matter. The court had decided on the case pursuant to O 33 r 5 of the Rules of Court 2012 without calling any witnesses. The issue to be determined was whether
F the second respondent should be liable for the tax imposed by the appellant. In the High Court, the appellant claimed for outstanding tax jointly and severally against the first respondent and the second respondent. The second respondent is the 20% shareholder and director of the first respondent since 19 December 2003. The tax claimed was for the years of assessment 2001–2004 including an
G increased assessment under s 103 of the Income Tax Act ('the ITA') amounting to RM3,003,910.69. The notices of assessment dated 31 October 2014 ('notices') regarding the said tax was served on the first respondent but both respondents did not respond to these notices. Therefore the appellant filed a claim to recover the tax at the High Court against both respondents. A
H judgment in default was entered against the first respondent, the High Court judge gave judgment for the appellant only for the amount of RM1,116,110.96 against the second respondent for the year of assessment 2004, as the second respondent became the director of the first respondent with effect from 19 December 2003, the High Court judge ruled that the
I second respondent could not be liable for the balance sum for the years of assessment before the second respondent became the director of the first respondent. The appellant submitted that the second respondent was a director at all material times of the first respondent and is therefore liable to pay the tax. Upon service of the notices on the first respondent, the tax became due and

payable by the second respondent even though the years of assessment referred to may well be before that. The second respondent's submission was that she must be served with notices in respect of the tax claimed but this was not done by the appellant. She should not be considered a director of the first respondent and therefore could no be liable to pay the tax.

Held, dismissing the appeal with costs:

(1) The court could not agree with the submission of the appellant in relation to the tax being due and payable when the notices were issued. It was untenable, inappropriate and unfair. someone who has not assumed the role as a director and thereby willing to take the responsibilities, should shoulder the burden undertaken by any company, including paying the tax. Holding anyone responsible, when they have not reached the stage to even ponder on the duties as a director, let alone actually undertake the post, can no doubt be harsh and unreasonable (see paras 11–12).

(2) The second respondent should not be required to seek the redress first before the Special Commissioners of Income Tax as provided by s 99(1) of the ITA, as the notices were not served on her. And the prescribed time to do so has expired through no fault of hers because again, the notices were not served on her (see para 30).

(3) The appellant claiming the tax pursuant to s 106(1) of the ITA is subjected to limitation of times of six years since the cause of action as stipulated in s 6(1)(d) of the Limitation Act. Issuing the notices in 2014 to claim for tax due and payable in 2001 to 2004, simply would be too late as the claim was caught by the above statutory provision regarding limitation (see paras 32–34).

(4) When the second respondent became the director of the first respondent, s 75A(2)(b) of the ITA back then, required a director to hold more than fifty percent shares before such director was made liable to pay the tax, the amendment to 20% came only in 2014. The statutory position when the second respondent became the director defined a director as someone owning more than 50% ordinary share capital. Therefore the second respondent could not be held liable under the present s 75A(2)(b) of the ITA as it does not apply retrospectively (see para 36–39).

(5) Knowing about the notices which were served on the first respondent does not necessarily mean that the second respondent was also served the same. It was a legal requirement for the second respondent to be served the notices by the appellant as stipulated in s 96(1) of the ITA. Section 96(1) must be read together with s 103(2) of the ITA and that s 103(2) could not stand alone to indicate the liability of the second

respondent in respect of the tax of the first respondent. The service of the notices must come first before the second respondent could be liable to tax (see paras 45–46 & 49).

(6) The second respondent could not be liable even for the tax for the year of assessment 2004 as: (a) no notice referring even for this year of assessment was served on the second respondent; and (b) the second respondent was not bound by the present s 75A(2)(b) of the ITA. However, the second respondent did not appeal against the decision of the learned High Court judge to find her liable for the year of assessment 2004. Since the second respondent was satisfied with the said decision and did not lodge an appeal, it was only proper for the court not to disturb this decision of the learned High Court judge. That part of the decision by the learned High Court judge against the second respondent should remain in favour of the appellant (see para 50).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap sebahagian daripada keputusan Mahkamah Tinggi mengenai perkara cukai. Mahkamah telah memutuskan kes tersebut berdasarkan A 33 k 5 Kaedah-Kaedah Mahkamah 2012 tanpa memanggil saksi. Isu untuk diputuskan adalah sama ada responden kedua bertanggungan terhadap cukai yang dikenakan oleh perayu. Di Mahkamah Tinggi, perayu menuntut untuk cukai terhutang secara bersama dan berasingan terhadap responden pertama dan kedua. Responden kedua merupakan pemegang saham 20% dan pengarah responden pertama sejak 19 Disember 2003. Cukai yang dituntut adalah untuk tahun taksiran 2001–2004 termasuklah taksiran yang ditingkatkan di bawah s 103 Akta Cukai Pendapatan ('ACP') berjumlah RM3,003,910.69 notis taksiran bertarikh 31 Oktober 2014 ('notis-notis tersebut') berkaitan dengan cukai tersebut diserahkan kepada responden akan tetapi kedua-dua responden tidak membalas kepada notis-notis tersebut. Oleh yang demikian penuntut memfailkan tuntutan untuk mendapatkan semula cukai di Mahkamah Tinggi terhadap kedua-dua responden. Satu penghakiman ingkar telah dimasukkan terhadap responden pertama, hakim Mahkamah Tinggi memberikan penghakiman memihak kepada responden untuk jumlah RM1,116,110.96 terhadap responden kedua untuk tahun taksiran 2004, memandangkan responden kedua menjadi pengarah responden pertama berkuatkuasa 19 Disember 2013, hakim Mahkamah Tinggi memutuskan bahawa responden kedua tidak boleh bertanggungan kepada baki jumlah untuk tahun taksiran sebelum responden kedua menjadi pengarah responden pertama. Perayu menghujahkan bahawa responden kedua merupakan pengarah pada semua masa material responden pertama dan oleh itu adalah bertanggungan untuk membayar cukai tersebut. Selepas penyerahan notis-notis tersebut kepada responden pertama, cukai tersebut telah menjadi terhutang dan perlu dibayar oleh responden kedua walaupun tahun taksiran yang dirujuk adalah sebelum itu. Hujahan responden kedua adalah dia perlu

diserahkan notis tersebut berkaitan dengan cukai yang dituntut tetapi ini tidak dilakukan oleh perayu. Dia tidak boleh dianggap sebagai pengarah responden pertama dan oleh yang demikian tidak boleh bertanggungan untuk membayar cukai tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Mahkamah tidak boleh bersetuju dengan hujahan perayu berkaitan dengan cukai terhutang dan perlu dibayar apabila notis-notis tersebut dikeluarkan. Ia tidak boleh disokong, tidak sesuai dan tidak adil. Seseorang yang belum menjadi pengarah dan oleh itu sanggup untuk memikul tanggungjawab, seharusnya memikul beban yang diambil oleh mana-mana syarikat, termasuklah untuk membayar cukai. Membuat sesiapa bertanggungjawab, apabila mereka belum tiba ke tahap untuk memikirkan tentang tanggungjawab seorang pengarah, apatah lagi memegang tanggungjawab tersebut, adalah tidak munasabah dan teruk (lihat perenggan 11–12).

(2) Responden kedua tidak harus dikehendaki untuk mendapatkan tebus rugi daripada pesuruhjaya khas cukai pendapatan sepertimana yang diperuntukan oleh s 99(1) ACP, kerana notis-notis tersebut tidak diserahkan kepadanya. Dan masa yang ditetapkan untuk berbuat sedemikian telah tamat dan ianya bukan merupakan salahnya kerana sekali lagi notis-notis tersebut tidak diserahkan kepadanya (lihat perenggan 30).

(3) Perayu menuntut cukai tersebut selaras dengan s 106(1) ACP adalah tertakluk kepada had masa enam tahun memandangkan kausa tindakan yang ditetapkan di bawah s 6(1)(d) Akta Had Masa. Mengeluarkan notis-notis tersebut pada tahun 2014 untuk menuntut kepada cukai terhutang dan perlu dibayar pada tahun 2001 hingga 2004, adalah terlalu lewat kerana tuntutan tersebut terjatuh di bawah peruntukan statutori berkaitan dengan had masa (lihat perenggan 32–34).

(4) Apabila responden kedua menjadi pengarah responden pertama, s 75A(2)(b) ACP pada waktu tersebut, memerlukan satu pengarah untuk memegang lebih daripada 50% saham sebelum pengarah tersebut menjadi bertanggungan untuk membayar cukai tersebut, pindaan kepada 20% hanya berkuatkuasa pada 2014. Peruntukan statutori yang mana responden kedua menjadi pengarah menafsirkan pengarah sebagai seorang yang memiliki lebih daripada 50% saham biasa. Oleh itu, responden kedua tidak boleh bertanggungan di bawah s 75A(2)(b) ACP kini kerana ianya tidak memberi kesan kebelakang (lihat perenggan 36–39).

(5) Mengetahui tentang notis-notis tersebut yang diserahkan kepada responden pertama tidak semestinya bermaksud bahawa responden

kedua juga diserahkan yang sama. Ianya merupakan keperluan undang-undang untuk responden kedua turut diserahkan notis-notis tersebut oleh perayu sepertimana ditetapkan oleh s 96(1) ACP. Seksyen 96(1) harus dibaca bersama s 103(2) ACP dan bahawa s 103(2) tidak boleh berdiri dengan sendirinya untuk menyatakan liabiliti responden kedua berkaitan dengan cukai responden pertama. Peyerahan notis harus datang dahulu sebelum responden kedua boleh bertanggungan keapda cukai tersebut (lihat perenggan 45–46 & 49).

(6) Responden kedua tidak boleh bertanggungan kepada cukai untuk tahun taksiran 2004 kerana: (a) tiada notis merujuk kepada tahun taksiran diserahkan kepada responden kedua; dan (b) responden kedua tidak terikat dengan s 75A(2)(b) ACP kini. Namun responden kedua tidak merayu terhadap keputusan hakim mahkamah tinggi terpelajar untuk mendapatinya bertanggungan untuk tahun taksiran 2004. Memandangkan responden kedua berpuas hati dengan keputusan tersebut dan tidak memfailkan rayuan, ianya adalah tepat untuk mahkamah ini tidak mengganggu keputusan hakim Mahkamah Tinggi. Bahagian keputusan ini oleh hakim Mahkamah Tinggi terhadap responden kedua harus kekal memihak kepada perayu (lihat perenggan 50).]

Cases referred to

Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292; [2018] 1 CLJ 415, FC (refd)

Kerajaan Malaysia v Mudek Sdn Bhd [2017] 5 MLJ 133; [2017] 10 CLJ 158, FC (distd)

Kerajaan Malaysia v Rohana bt Abu [2018] MLJU 161; [2018] 9 CLJ 355, HC (refd)

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292; [1995] 1 CLJ 491, CA (refd)

Sun Man Tobacco Co Ltd v Government Of Malaysia [1973] 2 MLJ 163, FC (distd)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)

Legislation referred to

Finance (No 2) Act 2002 s 3

Income Tax Act 1967 ss 75A, 75A(1)(a), (1)(b), (2)(b), 90(1), 91A(1), 96(1), 99(1), 103, 103(2), 106(1), (3)

Limitation Act 1953 s 6(1)(d)

Real Property Gains Tax Act 1976

Rules of Court 2012 O 33 r 5

Rules of the High Court 1980 O 53 r 3, Form J

Appeal from: Civil Suit No WA-21NCVC-115–11 of 2017 (High Court, Kuala Lumpur)

Norzilah bt N Hamod @ Abdul Hamid (Al-Hummidallah bin Idrus with him) (Inland Revenue Board) for the appellant.
Ramesh Kanapathy (Aminruddin Salleh with him) (Chellam Wong) for the second respondent.

Abu Bakar JCA:

INTRODUCTION

[1] The appellant, Government of Malaysia is before us for a partial appeal against the decision of the High Court on a tax matter. On agreement by parties, the High Court decided the case pursuant to O 33 r 5 of the Rules of Court 2012 without calling witnesses.

[2] Essentially, this written judgment deals with the issue of whether the second respondent should be liable for the tax imposed by the appellant. In doing so, the relevant statutory provisions regarding tax will be highlighted in coming to the decision on this appeal.

BACKGROUND FACTS

[3] At the High Court, the appellant claimed outstanding tax jointly and severally against Mahawira Sdn Bhd, the first respondent and Teh Li Li, the second respondent. The second respondent is the 20% shareholder and director of the first respondent with effect from 19 December 2003. The tax claimed was for the amount of RM3,003,910.69 for the years of assessment 2001, 2002, 2003 and 2004, including increased assessment under s 103 of the Income Tax Act 1967 ('the ITA'). Notices of assessment dated 31 October 2014 ('notices') regarding the said tax were served on the first respondent but both respondents did not respond to these notices. Therefore, the appellant filed the claim to recover the tax at the High Court against both respondents.

[4] The first respondent did not contest the claim at the High Court. Hence, judgment in default of appearance was entered against the first respondent.

[5] The learned High Court judge gave judgment for the appellant only for the amount of RM1,116,110.96 against the second respondent for the year of assessment 2004. This is because the second respondent became the director of the first respondent only as stated, with effect from 19 December 2003. The learned High Court judge ruled that the second respondent could not be liable

for the balance sum of RM1,887,799.73 for the years of assessment, 2001, 2002 and 2003 as the second respondent was not the director of the first respondent then.

[6] The appellant is aggrieved by that decision of the learned High Court judge. The thrust of the appellant's appeal is on the decision of the High Court's finding that the second respondent should be liable for the tax of the first respondent only when she became the director of the company and not at other times. Hence, the present appeal.

GIST OF SUBMISSIONS OF BOTH PARTIES

[7] The appellant contended that the second respondent was a director at all material times of the first respondent and therefore is liable to pay the tax. Upon service of the notices on the first respondent, the tax became due and payable by the second respondent. The tax became due and payable when the notices were issued, even though the years of the assessment referred to may well be before that.

[8] The second respondent argued that she must be served with the notices in respect of the tax claimed but this was not done by the appellant. She should not be considered a director of the first respondent and therefore could not be liable to pay the tax.

OUR DECISION

[9] The elaboration on the reasons of our decision regarding the appeal is as follows.

A. Section 75A of the ITA

[10] As agreed, both parties proceeded at the High Court to determine the extent of the liability of the second respondent regarding the tax by primarily referring to s 75A of the ITA that states as follows:

> (1) Notwithstanding anything contrary to this Act or any other written law:
>
> (a) *where any tax is due and payable* under this Act by a company, *any person who is a director of that company during the period* in which that tax is liable to be paid by that company; or
>
> (b) where any debt is due and payable from an employer under any rules made pursuant to section 107 and the employer is a company, *any person who is a director of that company during the period in which the debt is liable to be paid by that company*,

shall be jointly and severally liable for such tax or debt, as the case may be, that is due and payable and shall be recoverable under section 106 from that person. A

(2) In this section, 'director' means any person who:

(a) is occupying the position of director (by whatever name called), including any person who is concerned in the management of the company's business; and B

(b) is, either on his own or with one or more associates within the meaning of subsection 139(7), the owner of, or able directly or through the medium of other companies or by any other indirect means to control, *not less than twenty per cent of the ordinary share capital of the company* ('ordinary share capital' here having the same meaning as in the definition of 'director' in section 2). (Emphasis added.) C

[11] In reference to sub-s (1)(a) above, the appellant contended that the tax pertains to the years of assessment 2001, 2002, 2003 and 2004. And the notices issued, meant that the tax for the years 2001, 2002, 2003 and 2004 only became due and payable when the notices regarding the same were issued in 2014. Since the notices were issued only in 2014, according to the appellant, the tax was not due and payable in 2001, 2002, 2003 or 2004. Instead, it only became due and payable in 2014 when the notices were issued. When the notices were issued, the second respondent was already a director of the first respondent (became director on 19 December 2003). Therefore, by virtue of sub-s (1)(b) above, the appellant submitted that the second respondent must pay the tax for the years 2001, 2002, 2003 and 2004 as the second respondent is jointly and severally liable with the first respondent. D E F

[12] With respect, we could not agree with the appellant's submission. Following the appellant's argument, this would mean no matter at what point in time anyone becomes a director of a company, he or she will still be held liable for the tax of the company for the years of assessment preceding the appointment as director. By analogy, if someone becomes a director of the first respondent on 31 October 2014, the date of the notices, he or she could be liable for the tax of the first respondent some 13 years earlier, in 2001, as requested by the assessment in this case. The director could even be liable many years before 2001. We find this with respect is untenable, inappropriate and unfair to the second respondent. We could not find someone who has not assumed the role as a director and thereby willing to take the responsibilities, should shoulder the burden undertaken by any companies, including paying the tax. Holding anyone responsible, when they have not reached the stage to even ponder on the duties as a director, let alone actually undertake the post, can no doubt be harsh and unreasonable. Anyone in that sense, should only be held liable if he or she at the material time has already been appointed as a director. Consequently, we agree with the learned High Court judge, that the G H I

second respondent could only be held liable for the tax in respect of the year of assessment 2004 but not for 2001, 2002 and 2003. We also agree with the learned High Court judge that the words 'during the period' as stated in sub-s (1)(a) above, must mean only when the second respondent was made a director of the first respondent ie on 19 December 2003.

B. The second respondent's position

[13] In any event, the second respondent was not the director of the first respondent in 2001, 2002 and almost the whole year of 2003. There is no dispute about this. Therefore, it is only logical she could not be liable for the tax imposed on the first respondent for the years of assessment of 2001, 2002 and 2003.

C. Section 103(2) of the ITA and the distinguishable cases

[14] The appellant also argued that under s 103(2) of the ITA, the tax became due and payable once the notices were served in 2014. This provision states as follows:

> Where an assessment is made under subsection 90(3), section 91, 92 or 96A, or where an assessment is increased under subsection 101(2), *the tax payable under the assessment or increased assessment shall, on the service of the notice of assessment or composite assessment or increased assessment*, as the case may be, be due and payable on the person assessed at the place specified in that notice whether or not that person appeals against the assessment or increased assessment. (Emphasis added.)

[15] Having regard to the above provision too, the appellant contended that since the notices were served in 2014, the tax became due and payable by the second respondent only in 2014. As stated, the tax according to the appellant was not due and payable in 2001, 2002, 2003 and 2004.

[16] In asserting that the tax became due and payable only when the notices were served in 2014, the appellant cited the Federal Court case of *Sun Man Tobacco Co Ltd v Government Of Malaysia* [1973] 2 MLJ 163 particularly where it was said as follows:

> *There is a string of decided cases* (*ABC v The Comptroller of Income Tax, Singapore* [1959] 1 MLJ 162; *Comptroller of Income Tax v RST* [1962] 1 MLJ 216; *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282; *Comptroller of Income Tax v AB and Comptroller of Income Tax v CD Ltd* [1967] 1 MLJ 11; *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98; *Government of Malaysia v DC* [1973] 1 MLJ 161 and *Comptroller-General of Inland Revenue v NP* [1973] 1 MLJ 165) in which it has been held that the effect of the relevant provisions of the Income Tax Act, 1967 is that *on the service of a notice of assessment on the person assessed the tax payable under the assessment becomes due and*

payable at the place specified in the notice, whether or not the person appeals against the assessment, and can then be recovered by the government by civil proceedings as a debt due to the government. (Emphasis added.)

[17] The brief facts of the above case must first be explained to determine whether the decision in the same should be followed in the present appeal. In the above case, the appellant had appealed against the judgment of the High Court giving leave to the respondent to sign final judgment against the appellant for certain sum alleged to be income tax due from the appellant. It was argued on the appeal that s 106(3) of the ITA (which provides that in any proceedings under the section, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed under appeal or incorrectly increased) did not apply in any case where the taxpayer contends that no tax whatsoever is due by him.

[18] The Federal Court in this case held that the learned trial judge was right in giving leave to the respondent to sign final judgment and in holding that if the taxpayer wished to dispute that the amount of tax sought to be recovered was excessive, incorrectly assessed under appeal or incorrectly increased, he has to do so by way of appeal to the Special Commissioners of Income Tax.

[19] As seen, the dispute in the above case does not revolve around the issue as in this present appeal, where the second respondent submitted she was not the director of the first respondent at the material times and that she was never served the notices.

[20] Further, as stated, the relevant statutory provision argued in the above case was s 106(3) of the ITA. It was not on s 75A of the ITA as referred by both parties in the present appeal before us. In fact, s 75A of the ITA was never mentioned at all in the above decision of the Federal Court.

[21] Since the facts in the above case are not similar and the legal arguments pertain to different provisions of the ITA, with respect the appellant in the present appeal before us is wrong to have cited the above case. Thus, we are of the view that the above case should not be followed as the facts and statutory provisions argued are different from the present case before us.

[22] Another case referred by the appellant is the Federal Court case of *Kerajaan Malaysia v Mudek Sdn Bhd* [2017] 5 MLJ 133; [2017] 10 CLJ 158 and similarly the appellant highlighted the following passage:

We hold that pursuant to s 21(1) of the said Act, once a notice of assessment has been served, the tax payable will be due and payable. If the respondent felt aggrieved by the issue of no chargeable gain arising, the respondent should have lodged an appeal to the Special Commissioners of Income Tax pursuant to s 18 of the said Act.

[23] In this case, summary judgment was entered in favour of the appellant, Government of Malaysia, by the High Court. The Court of Appeal reversed that decision of the High Court. The Federal Court in turn, reversed the decision of the Court of Appeal and allowed the summary judgment. The issue in this case was whether there has been chargeable gain accruing on disposal of assets by the respondent under the Real Property Gains Tax Act 1976 ('the RPGTA').

[24] With respect, it is inappropriate for the appellant in our present appeal to quote the passage above because the words 'of the said Act' in that passage do not even refer to the ITA but only to the RPGTA. Further, the issue in this case affect the RPGTA and not at all s 75A of the ITA. In fact, none of the provisions of the ITA was referred in this case. Thus, the above case can also be distinguished on facts. Therefore, we are of the considered view, we should not follow this case.

[25] The third and last case cited by the appellant to support its contention is the Court of Appeal case of *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235. The appellant quoted the following passage of this case:

> It has to be clarified that a prompt payment to the Inland Revenue is not an indulgence on the part of a taxpayer but a statutory requirement. The law on this point is well established, as once the Director General has made an assessment, and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned, he must pay up that tax liability within a specific period, even though dissatisfied with that assessment. Whether the assessment is right or wrong the tax must be paid notwithstanding any objection or appeal (*Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98; [1969] 1 LNS 32). Any reluctance to pay that tax liability will attract a penalty imposed for late payment; under s 103(4) a penalty of 10% on the unpaid tax if remains unpaid within 30 days of receipt of the assessment and another 5% for the balance under s 103(5) if remains unpaid within 60 days. Choor Singh J in *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 284; [1966] 1 LNS 43 had lucidly summed up the law as regards the need to pay up, on receipt of the notice of assessment, when he observed:
>
> > A taxpayer has no right to by-pass the Board of Review (an entity equivalent to the Malaysian Special Commissioners) and take his complaint direct to court. And when the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which the tax has been levied was not made in accordance with the provisions of the Ordinance. Such a complaint must in the first instance be laid before the Board of Review ... If this is not done every unwilling taxpayer will refuse to pay tax and when sued in court will challenge the merits of the assessment, thus causing considerable delay in the collection of tax. The proper course for every aggrieved taxpayer is to pay his tax and present his argument

against the assessment made upon him before the Board of Review. A

[26] In this case, the facts as reported, showed the appellant filed an application for leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980, for an order of certiorari to quash and set aside a Form J notice of assessment dated 1 August 2003 issued by the first respondent to the appellant for income tax year of 1998. The respondents raised a preliminary objection, contending that there was an alternative remedy of appeal that the appellant had yet to exhaust. The appellant's application was thus alleged to be an abuse of the process of the court. The trial judge agreed to the objection and dismissed the appellant's application, resulting in the appeal by the appellant at the Court of Appeal. The matter under complaint was that the Form J sent to the appellant was invalid in law and that it contained an error of law on the face of that document. The appellant further submitted that the availability of an appeal procedure to the Special Commissioners of Income Tax would not automatically shut out an application for certiorari. B C D

[27] The issue before the Court of Appeal then was whether the appellant should have exhausted the alternative remedy of appeal to the Special Commissioners of Income Tax that was available to the appellant. Again, in this case there was no issue at all pertaining to the construction of s 75A of the ITA. In fact, this statutory provision was not even referred to in this case. Therefore, since the facts in this case are different from the facts of the present appeal before us, with respect, again we are not inclined to follow this case. E F

[28] Further, even if the appellant in our present appeal intended to quote the above passage to show that the second respondent should pay the tax pursuant to the notices and argue her case later, this is not the purport and intent of s 75A of the ITA. With respect, studying this statutory provision, the language of the same, does not prohibit the second respondent from raising the points she had contended against the appellant's claim. G

[29] In addition, this is not even the pleaded case of the appellant in its statement of claim and reply to the defence of the second respondent. Nothing is said in the appellant's cause papers about this point that the second respondent must pay the tax first and then only argue her objection before the Special Commissioners of Income Tax. In this regard, it is trite that material facts and issues must be pleaded. On this point, the Federal Court case of *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292; [2018] 1 CLJ 415 states as follows: H I

> It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded … where a vital issue was not

A raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside ...

B **[30]** Besides, the second respondent should not be required to seek the redress first before the Special Commissioners of Income Tax as provided by s 99(1) of the ITA, as the notices were not served on her. And the prescribed time to do so has expired through no fault of hers because again, the notices were not served on her (more on the service of the notices is elaborated in 'G' below).

C

D. Limitation

D **[31]** On the whole, what is also disturbing with regard to the effect of the appellant's submission is that the appellant is granted all the time to raise and make the assessment for tax and produce such notices. The submission if accepted, means there is no timeline for the appellant to make the assessment and thereafter to issue such notices. Certainly this is unreasonable and not fair to anyone who is suddenly confronted with the need of paying the tax after many years on account of the indolence of the appellant itself. As stated, in this particular case, the notices were only issued towards the end of 2014 for tax for the years 2001 to 2004. That is roughly a decade or more later.

E

F **[32]** In this regard, it is also relevant to note that at para 13 of the appellant's statement of claim, it is stated that the appellant is claiming the tax pursuant to s 106(1) of the ITA that states as follows:

> Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

G **[33]** Since the appellant itself had expressly stated it is relying on the above provision for its claim, there can be no doubt that such claim is subjected to limitation of time of six years since the cause of action. This is stipulated in s 6(1)(d) of the Limitation Act 1953 as follows:

H

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> I (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) *actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture*. (Emphasis added.)

[34] The words 'any written law' above, should include the ITA (specifically s 106(1) of the ITA, as narrated). Therefore, the above provision reinforced our view that it does not lie in the mouth of the appellant that it could issue the notices in 2014 to claim for the tax in the years of assessment 2001, 2002, 2003 and 2004. Issuing the notices in 2014 to claim for tax due and payable in 2001 to 2004, simply would be too late as the claim is caught by the above statutory provision regarding limitation. The appellant could not escape the above provision as it had initiated the present proceeding in court. It is bound by the above provision and in fact, having perused the whole of the ITA, we could not find anything in the same that provides the appellant is exempted and should not be constrained by the above provision.

E. Director

[35] Another important point in favour of the second respondent is that at all material times, the present s 75A(2)(b) of the ITA could not operate against her (please see the provision as narrated).

[36] It is undisputed that the present provision set the threshold of owning not less than 20% ordinary share capital of the company for a director to be liable in paying the tax of the company. However, when the second respondent became the director of the first respondent, s 75A(2)(b) of the ITA back then, required a director to hold more than 50% shares before such director is made liable to pay the tax. The amendment to the provision from 50% to 20% presently is best explained in the case of *Kerajaan Malaysia v Rohana bt Abu* [2018] MLJU 161; [2018] 9 CLJ 355. It states as follows:

> Section 75A of the ITA was introduced by the Finance Act (No 2) 2002 (Act 624) and took effect on 27 December 2002. The section was amended by the Finance Act 2005 (Act 644) which took effect from 1 January 2006. Section 75A as amended by Act 644 reads as follows:
>
> 75A(1) Not withstanding anything contrary to this Act or any other written law:
>
> (a) where any tax is due and payable under this Act by a company, *any person who is a director of that company during the period in which that tax is liable to be paid by that company*; or
>
> (b) where any debt is due and payable from an employer under any rules made pursuant to section 107 and the employer is a company, any person who is a director of that company during the period in which the debt is liable to be paid by that company,
>
> shall be jointly and severally liable for such tax or debt, as the case may be, that is due and payable and shall be recoverable under section 106 from that person.
>
> (2) In this section, *'director' means any person who*:
>
> (a) is *occupying the position of director* (by whatever name called), including

any person who is concerned in the management of the company's business; and

(b) is, either on his own or with one or more associates within the meaning of subsection 139(7), the owner of, or able directly or through the medium of other companies or by any other indirect means to *control, more than fifty per cent of the ordinary share capital of the company* ('ordinary share capital' here having the same meaning as in the definition of 'director' in section 2).

Section 75A was further amended by s 20 of the Finance Act 2014 (Act 761) ('FA 2014') in 2014. Section 20 of the FA 2014 amended sub-s (2)(b) by substituting the words 'more than fifty percent' with the words 'not less than twenty percent'.

Section 75A of ITA after sub-s (2)(b) was amended by FA 2014 reads as follows:

...

(2) In this section, 'director' means any person who:

(a) is occupying the position of director (by whatever name called), including any person who is concerned in the management of the company's business; and

(b) is, either on his own or with one or more associates within the meaning of subsection 139(7), the owner of, or able directly or through the medium of other companies or by any other indirect means to control, not less than twenty per cent of the ordinary share capital of the company ('ordinary share capital' here having the same meaning as in the definition of 'director' in section 2).

The amendment to s 75A(2)(b) took effect on the coming into operation of the FA 2014 on 23 January 2014. Prior to the FA 2014 coming into operation, a director is defined in s 75A of the ITA, as a person who holds the position of director and holds more than fifty percent (50%) shares in the company during the period the tax is liable to be paid. After the coming into operation of the FA 2014, a director is defined in s 75A of the ITA, as a person who holds the position of director and holds not less than twenty percent (20%) shares in the company during the period the tax is liable to be paid. (Emphasis added.)

[37] As seen, the amendment to 20% came only in 2014. Prior to that, it was 50%. Hence when the second respondent was appointed as a director on 19 December 2003, the statutory provision then defined a director as someone owning more than 50% of the ordinary share capital. In this regard, there is no dispute at all material times, the second respondent never owned more than 50% ordinary share capital of the first respondent. She could not be considered as a director under the old provision because the same required a director to have more than 50% of the ordinary share capital. Therefore, the second respondent could not be held liable under the present s 75A(2)(b) of the ITA. The present provision does not apply to her.

[38] It is also relevant to note *Rohana Abu* further said: A

> There is a surfeit of Federal Court and Supreme Court cases, which all hold that an Act, particularly amending statutes shall not be construed retrospectively unless it is expressly provided for in the statute passed by Parliament. The Federal Court in *Public Prosecutor v Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 14; [1976] 1 LNS 96; held that the general rule is that statutes, particularly amending statutes, are prima facie prospective. It held that a statute is not to be construed retrospectively unless it is clear that such was the intention of Parliament from the language of the Act itself. Raja Azlan Shah FJ (as HRH then was) in delivering the judgment of the Federal Court held that: B
>
> > *The general rule is that statutes, particularly amending statutes, are prima facie prospective, and retrospective effect is not to be given to them unless by clear words or necessary implication*. This presumption does not always apply in cases of legislation dealing with procedure or evidence. (Emphasis added.) C

[39] And in this regard, it is not disputed that there is no statutory stipulation whatsoever that the present s 75A(2)(b) of the ITA is to be applied retrospectively. Therefore, it should be clear that the second respondent could not be bound by the present s 75A(2)(b) of the ITA. D

[40] Also material to note is the similar facts of *Rohana Abu* and the present case before us. And the similar facts include the relationship between the years of assessment and the circumstance upon which a director should be held liable to pay the tax of the company. In *Rohana Abu*, it was decided on this point as follows: E F

> In this instant case, the period for which the company is liable for the additional taxes raised is YA 2008, YA 2009 and YA 2010. Pursuant to s 75A, during that period, 'director' of the company is 'any person who is occupying the position of director ... and is ... the owner of ... more than 50 percent of the ordinary share capital of the company ...'. During the YA 2008, YA 2009 and YA 2010, the defendant was a director of the company but held only 20% shares in the company. Therefore, pursuant to s 75A, she was not a 'director' of the company 'during the period in which that tax is liable to be paid by the company. G

[41] Likewise the position of the second respondent is similar to the defendant in the above case. We are of the view that the passage above reflects the position of the second respondent and agree that in the present appeal too, the second respondent could not be liable as she did not own 50% ordinary share capital as required by s 75A of the ITA then. H I

[42] It is also important to bear in mind that the second respondent's substantive rights would be affected if the provision is to be applied retrospectively. She would be prejudiced in the event the provision is ruled to be retrospective in nature as she had obtained that right not to be considered as

a director back then when the provision stipulated a director is someone who had more than 50% ordinary share capital of the company. The Court of Appeal case of *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292; [1995] 1 CLJ 491 is relevant on this point as it states as follows:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

F. Retrospective effect

[43] At para 60 of the appellant's written submission, the appellant also submitted, it does not arise whether the present s 75A of the ITA has retrospective effect or should only be applied prospectively. With respect, to our mind the appellant is wrong here because as explained in 'E' above, the present s 75A(2)(b) of the ITA clearly is different from the old provision then. As explained earlier, the present provision stipulates more than 20% shares for a person to be considered a director, while the previous provision narrated more than 50% shares. Obviously the question whether the present provision should be applied retrospectively or only prospectively, should be considered as it affects the rights of the second defendant between the time the provision was in its initially form and in the present state after amendment.

[44] At para 2 of the memorandum of appeal, the appellant also asserted that the learned High Court judge erred in not considering that by virtue of s 3 of the Finance (No 2) Act 2002, the effective date of s 75A of the ITA was on 26 December 2002 (this date is asserted by the appellant itself in this memorandum of appeal). However, in reference to this particular provision of the ITA, the appellant referred to the old provision of s 75A of the ITA which stipulated that a director must own more than 50% of the ordinary share capital (as stated in para 56 of the appellant's written submission). According to the appellant, this nonetheless, would mean the appellant would be caught by this provision. This is again with respect wrong on the part of the appellant. The old provision could not apply to the appellant because there is no evidence she ever owned more than 50% of the ordinary share capital.

G. Service of the notices

[45] It is also relevant to note the contention of the second respondent that she was not served the notices. The second respondent submitted that the notices were only served on the first respondent. The appellant in turn argued

that the second respondent had received the notices based on the letter sent by the second respondent to the appellant dated 17 November 2014. However, perusing this letter (p 82 of appeal record Vol 2), we note that this letter did not indicate that the notices were indeed served on the second respondent. This letter from the second respondent only informed the appellant that the first respondent was wound up on 8 September 2008. This letter also sought to explain that the second respondent was not a director of the first respondent at the material time. We are of the opinion, knowing about the notices which were served on the first respondent does not necessarily mean that the second respondent was also served the same. Furthermore, the appellant in its statement of claim and reply to the defence of the second respondent did not dispute that the notices were not served on the second respondent either by hand or by post. Hence, it could not be disputed that the appellant did not serve the notices on the second respondent.

[46] In this regard, it is a legal requirement for the second respondent to be served the notices by the appellant as stipulated in s 96(1) of the ITA that states as follows:

> As soon as may be after an assessment, other than an assessment under subsections 90(1) and 91A(1), has been made, *the Director General shall cause a notice of assessment to be served on the person in respect of whom the assessment was made.* (Emphasis added.)

[47] There is no dispute that ss 90(1) and 91A(1) of the ITA as mentioned above are not relevant in this appeal. Nonetheless, as a matter of clarity, both these provisions are as follows:

> s 90(1) Where a person has furnished a return in accordance with section 77 or 77A to the Director General for a years of assessment, the Director General shall be deemed to have made, on the day on which the return is furnished, an assessment in respect of that person in the amount of tax on the chargeable income, the tax and the chargeable income being the respective amounts as specified in the return.
>
> s 91A(1) Where a person has furnished an amended return in accordance with section 77B for a years of assessment, the Director General shall be deemed to have made, on the day on which the amended return is furnished, an assessment or additional assessment in respect of that person:
>
> (a) in the amount of tax or additional tax payable on the chargeable income; or
>
> (b) in the amount of tax which has been or would have been wrongly repaid,
>
> the tax or additional tax and the chargeable income being the respective amounts as specified in the amended return.

[48] Both the above provisions apply in cases where the person being taxed, furnished a return. This is not the case in this appeal. Hence this is why there is no dispute the above two provisions do not apply in the present appeal.

[49] Section 96(1) of the ITA as earlier narrated, which requires the notices to be served on the second respondent must be read with s 103(2) of the ITA, also as shown earlier. In this regard, s 103(2) could not stand alone to indicate the liability of the second respondent in respect of the tax of the first respondent, if the notices were not served on the second respondent, as required by s 96(1) of the ITA. The service of the notices must come first before the second respondent could be liable of the tax. Since there is no dispute that there is no such service on her, the second respondent also could not be liable for the tax based on this reason. In fact, even s 103(2) of the ITA requires the service of the notices (please see this provision as narrated earlier).

H. The claim allowed

[50] The interpretation of the statutory provisions above regarding the need of service of the notices to the second respondent and the issue of being a director as stated in 'E' above, would also mean that the second respondent could not be liable even for the tax for the year of assessment 2004. This is because no notice referring even for this year of assessment was served on the second respondent. And also the second respondent is not bound by the present s 75A(2)(b) of the ITA as explained earlier. However, the second respondent magnanimously did not appeal against the decision of the learned High Court judge to find her liable for the year of assessment 2004. Since the second respondent is satisfied with the said decision and did not lodge an appeal, it is only proper for us not to disturb this decision of the learned High Court judge. That part of the decision by the learned High Court judge against the second respondent should remain in favour of the appellant.

CONCLUSION

[51] The explanation on the point whether the present s 75A(2)(b) of the ITA should be applicable to the second respondent and the other points as elaborated aforesaid, would mean there are no appealable errors warranting the learned High Court judge's decision to be disturbed. In any event, with respect to the appellant's appeal, we could not say that the decision of the court below is plainly wrong.

[52] Hence, we are unanimous in affirming the decision of the High Court and dismissing the appeal with costs to the second respondent.

Appeal dismissed with costs.

Reported by Izzat Fauzan